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Supreme Court of the United States

OCTOBER TERM, 1962

No. 1078

CONNECTICUT COMMITTEE AGAINST PAY TV,
STANLEY WARNER MANAGEMENT COMPANY,
LOEW'S, INC.,
CONNECTICUT THEATRES,
MANCHESTER DRIVE-IN THEATRE CORPORATION,
OUTDOOR THEATRES CORPORATION, *Petitioners*

v.

FEDERAL COMMUNICATIONS COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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June, 1962

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	7
Reasons for granting the writ	15
Conclusion	26
Appendix	1a

CITATIONS

CASES:

Blau v. Lehman, 82 S. Ct. 451	20
Border Pipeline Co. v. Federal Power Commission, 84 U.S. App. D.C. 142, 171 F. 2d 149	20
Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134	17
Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470	23
Functional Music, Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543, cert. den. 361 U.S. 813	8
Interstate Commerce Commission v. United States ex rel. Los Angeles, 280 U.S. 52	20
Muzak Corp., 8 F.C.C. 581	7, 9
Pulitzer Publishing Co. v. Federal Communications Commission, 68 U.S. App. D.C. 124, 94 F. 2d 249	16

STATUTES:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151, et seq.:	
Section 2	2, 3
Section 3(h)	3, 23
Section 3(o)	3, 23
Section 301	3, 4, 17
Section 303	4, 5, 6, 17, 18
Section 307(a)	6
Radio Act of 1927, 37 Stat. 302, et seq.	8, 17, 19

MISCELLANEOUS: Page

Address by Commissioner Frederick W. Ford, June 28, 1961, FCC Release, Mimeo. No. 6968 8
Application of Gotham Broadcasting Corp., FCC Report No. 6774, Mimeo. No. 20019 22
Brief of Appellants-Petitioners in the Court Below 25
Brief of Appellee-Respondent in the Court Below ... 24, 25
First Report on Subscription Television, 16 Pike & Fischer, R.R. 1509 ..... 9, 10, 11, 12, 14, 16, 17, 21, 23, 25
47 C.F.R. 4.101-4.351 19
47 C.F.R. 4.382 19
H. R. 586, 85th Cong., 1st Sess. 11
H. R. 68, 86th Cong., 1st Sess. 11
H. R. 166, 86th Cong., 1st Sess. 11
H. R. 3020, 86th Cong., 1st Sess. 11
Notice of Proposed Rule Making, Matter of Subscription Television Service, FCC 55-165 (Docket No. 11279, Feb. 10, 1955) 10
105 Cong. Rec. 4812-13 ..... 11, 12
Reply Brief of Appellants-Petitioners in the Court Below 25
Second Report on Subscription Television, 16 Pike & Fischer, R.R. 1539 11
S. 2268, 85th Cong., 1st Sess. 11
S. 591, 86th Cong., 1st Sess. 11
67 Cong. Rec. 5490-91, 12,335 ..... 8, 19
67 Cong. Rec. 12504 16
68 Cong. Rec. 2580, 2880-81, 3033 19
Third Report on Subscription Television, 16 Pike & Fischer, R.R. 1540a 11, 12, 14, 17, 21, 22, 23, 25

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Petitioners, an organization representing owners of motion picture theatres and other interested local groups in the Hartford, Connecticut area, and operators of individual motion picture theatres in the Hartford, Connecticut area, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 8, 1962.

OPINION BELOW

The Opinion of the Court of Appeals, printed in the Appendix, hereto, *infra*, p. 1a, has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 8, 1962 (App. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has the statutory authority to authorize a television system under which members of the public are required to pay a fee in order to view the programs presented?

2. If the Commission is empowered to authorize such pay-TV systems, must it first consider and determine whether it has the statutory authority to regulate the rates which will be charged the public, and if it determines that it has such authority, must it consider whether that power should be exercised?

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, as amended, 48 Stat. 1064, *et seq.*, 47 U.S.C. 151, *et seq.*, provides as follows:

> SEC. 2 . . .
>
> (b) Subject to the provision of section 301, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with in-

trastate communication service by wire or radio of any carrier, . . .

* * *

SEC. 3 . . .

(h) "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * *

(o) "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

* * *

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or district; or (b)

from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State, or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

* * *

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses or frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records

of programs, transmissions of energy, communications, or signal as it may deem desirable;

* * *

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation;

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

SEC. 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

STATEMENT

This petition seeks review of a judgment affirming a Report, Decision and Order of the Federal Communications Commission which granted, subject to specified conditions, the application of RKO Phonevision Co. (RKO)[1] for authority to conduct a trial operation of pay-TV over the facilities of television station WHCT, Hartford, Connecticut, for a period of three years (30 F.C.C. 301-322).[2] Petitioners were formally named by the Commission as respondents in the proceedings on the RKO application, and participated fully in the proceedings before the Commission (Decision, 30 F.C.C. 301).

An understanding of the issues raised in the instant case requires some consideration of the historical background of radio and television broadcasting operation in the United States. The general listening and viewing public has never been charged for the radio and television programs which it receives.[3] The economic sup-

[1] The application was filed by Hartford Phonevision Co., but during the pendency of the proceeding before the court below, the corporate name of the applicant was changed to RKO Phonevision Co.

[2] The Report, Decision and Order of the Commission which is the subject of these proceedings (hereinafter referred to as Decision), appears in the Joint Appendix in the court below in official slip opinion form. Consequently, references herein to the Commission Report, Decision and Order will utilize the official citation.

[3] The court below referred to the fact that other "subscription" services have in the past been found acceptable by the Commission and the courts. Neither of the systems referred to, however, ever operated in such a manner as to require the payment of a direct fee from the general listening audience. In *Muzak Corporation*, 8 F.C.C. 581, the Commission authorized an experimental operation in FM (frequency modulation) broadcasting similar to that authorized for television in the instant proceeding. That experiment

port for broadcasting comes from advertisers. Advertiser-supported broadcasting was already in existence when, in 1927, the Federal Radio Commission, which represented the first serious effort of the Federal Government to regulate broadcasting, was created. The distinction between American broadcasting and that of some foreign countries in this regard was recognized in the early Congressional debates which led to the enactment of the Radio Act of 1927.[4] The distinction has been extolled very recently by Commissioner Frederick W. Ford of the Commission, who stated in an address delivered on June 28, 1961:[5]

> Unlike the system of broadcasting developed in many countries, the American system of broadcasting has its foundation solidly on the free competitive enterprise system. Commercial advertising is one of the fundamental and necessary ingredients of this system. It is through the millions

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was never conducted, due primarily to the entry by the United States into World War II. Nor was the Commission's authorization of the experimental operation ever tested in the courts. The "functional music" project considered in *Functional Music, Inc.* v. *Federal Communications Commission*, 107 U.S. App. D.C. 34, 274 F. 2d 543, *cert. den.* 361 U.S. 813 did not involve the provision of a service for which the general public had to pay a fee. On the contrary, members of the general public were able to hear the FM transmissions without charge. Only limited subscriber groups paid a fee, and this fee was paid in order that certain of the material which was broadcast would be eliminated from the special receivers maintained by those subscribers. This service was of value to subscribers such as retail stores and restaurants which wished their clientele to hear the muscial portions of the transmitted programs without the advertising commercials and other spoken material.

[4] See 67 Cong. Rec. 5490-91, 12335.

[5] Address by Commissioner Ford before the Advertising Association of the West, FCC release, Mimeo. No. 6968.

> of dollars spent each year in advertising that the hundreds of radio and television stations in the United States have been constructed and maintained as profitable institutions; institutions which serve to amuse, entertain and inform the American people to a far greater extent perhaps than any other country in the world.

As will be discussed more fully, *infra;* although no such system has ever been authorized in the United States, it has been recognized from the beginning of American broadcasting that an alternative system in which the economic support would come from direct payments by the listening or viewing public might be technically feasible. In addition to the *Muzak* proposal referred to in footnote 3, *supra,* the Commission has, in fact, authorized experimental operation of at least three different systems of pay-TV for the purpose of ascertaining whether they are technically feasible.[6] None of these experiments permitted the charge of a fee to any member of the public; they were designed exclusively to determine whether the encoding and decoding devices which would be utilized would work, and whether their use would involve any serious degradation of the transmitted signal. It was not until 1955 that the Commission took any formal action looking toward the authorization of even a trial pay-TV operation which would involve charging fees to members of the general viewing public.

At that time the Commission, in response to petitions by a number of pay-TV proponents who sought permanent authorization for their systems, instituted a

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[6] See *First Report on Subscription Television,* 16 Pike and Fischer, R. R. 1509, 1513.

Notice of Proposed Rule Making[7] which solicited comments on a number of questions, including whether the Commission had power to authorize pay-TV operations, and if such power existed, whether such operations would serve the public interest.

In 1957, the Commission, after considering the comments which had been filed, issued its First Report on pay-TV[8] in which the Commission concluded that the Communications Act of 1934, as amended, provided the statutory authority for it to authorize pay-TV operations, and set forth the conditions under which the Commission would consider applications for a "trial" of pay-TV in which members of the general public would be charged directly for the programs which they viewed. The First Report would have allowed trial operation of any pay-TV system[9] in any of the twenty major markets in the United States which currently receive at least four television services. No one system, however, would have been permitted to operate in more than three markets. 16 Pike and Fischer, R.R. at 1524.

The issuance of the First Report stirred critical comment. The House Committee on Interstate and Foreign Commerce held hearings on the Report and eventually adopted a Resolution stating that until the Communications Act was specifically amended

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[7] *Matter of Subscription Television Service*, FCC 55-165 (Docket No. 11279, Feb. 10, 1955).

[8] *First Report on Subscription Television*, 16 Pike and Fischer, R. R. 1509 (hereinafter referred to as "First Report").

[9] The First Report referred to five different systems of pay-TV which had been called to the Commission's attention, three of which had already been field tested to determine their technical capacities. 16 Pike and Fischer, R. R. at 1513.

to grant the Commission power to authorize pay television operations, no such action should be undertaken. The basis of Congressional apprehension was that such trial operations and the consequent investment of large sums of money in pay-TV systems by their promoters and by the public would virtually establish pay-TV as a *fait accompli* without specific Congressional approval.[10] In response to these fears the Commission issued its Second Report on pay-TV operations, which withheld the processing of applications filed under the First Report until the expiration of the 85th Congress.[11] This policy was voluntarily continued by the Commission until the end of the 86th Congress.

Upon the expiration of the 86th Congress, the Commission reevaluated the controversy and issued its Third Report.[12] The Third Report readopted and reaffirmed virtually all of the conditions for trial operation which had been set forth in the First Report. However, for present purposes, the most significant change was that the trials were to be limited to one system in each market and to only one market for each

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[10] See Remarks of Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee, 105 Cong. Rec. 4812. In addition, numerous bills have been introduced in Congress which would have prohibited the Commission from authorizing pay television operations. See, *e.g.*, H.R. 586, 85th Cong. 1st Sess. (1957); H.R. 166, 86th Cong. 1st Sess. (1959); H.R. 68, 86th Cong. 1st Sess. (1959); H.R. 3020, 86th Cong. 1st Sess. (1961); S. 2268, 85th Cong. 1st Sess. (1957); S. 591, 86th Cong. 1st Sess. (1959).

[11] *Second Report on Subscription Television*, 16 Pike and Fischer, R. R. 1539.

[12] *Third Report on Subscription Television*, 16 Pike and Fischer, R. R. 1540a (hereinafter referred to as "Third Report").

system. 16 Pike and Fischer, R.R., at 1540b. The Commission stated that when "sufficient and meaningful data" became available it would hold public hearings to decide whether pay-TV should be permanently authorized. 16 Pike and Fischer, R.R., at 1533. The House Committee, by a vote of 11 to 10, then adopted a Resolution which stated, in effect, that it had no objection to a "trial" operation under the new limitations of the Third Report. There was nothing in that Resolution which indicated any change in the Committee's views on the basic power of the Commission to authorize regular pay-TV operations. 105 Cong. Rec. 4812-4813.

After the Commission issued its Third Report, RKO purchased the assets of television station WHCT in Hartford, Connecticut, and applied for authority to utilize that station for a pay television trial under the terms of the Third Report. The RKO system will operate as follows:

RKO, as the *actual broadcast* licensee of WHCT, will use the Zenith Radio Corporation "Phonevision" system.[13] It proposes to broadcast a scrambled signal—for some 40 of its 70 broadcast hours during

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[13] RKO Phonevision Company is a wholly owned subsidiary of RKO General, Inc. The latter, in turn, is the franchise holder of Zenith's Phonevision System for the Hartford area. Zenith is the holder of the patents covering the pay television system equipment and will directly supply the decoders. (Decision, 30 F.C.C. 306.) An entity known as Teco, Inc. has been granted licenses by Zenith to distribute Zenith's encoding equipment to RKO, and will also aid in the procurement of programming for the Hartford operation. The Commission found that "substantial identity of ownership and interest in Zenith and Teco" exists (*ibid.*).

prime television time[14]—over the frequency assigned to WHCT which signal cannot be received by the ordinary television receiver. In order to render the scrambled signal intelligible, a subscriber must attach a decoding unit to his set and must tune the decoder to a code number which corresponds to the code number of the transmitted signal.

In order to avail himself of this pay-TV service, a subscriber must pay three separate and distinct charges. He must bear the cost of installation of the decoders, which was estimated by RKO to be between $7.50 and $10.00. In addition, he will be charged a weekly rental fee of up to $.75 and, of course, he will have to pay for each program separately. This latter charge will vary from between $.25 to $3.50. RKO expects that the majority of programs will fall within a price range of $.75 to $1.50. It contemplates a maximum of 50,000 subscribers. See Decision, 30 F.C.C. 304, 305.

RKO promised that its programming fare would consist primarily of first run movies which may be supplemented by such "box office" attractions as legitimate threatre, opera, ballet and concert performances (Decision, 30 F.C.C. 307-08). A "box office" attraction is one which, in the opinion of RKO, would command the payment of a fee from the public if produced outside of television and/or is not now available to free television viewers. RKO admitted, however, and the Commission's Decision recognized (*Id.* at 308), that RKO would offer programs which met its definition of "box office" attraction even though such pro-

[14] These hours are 7:30 through 11:00 p.m. every day, 5:30 through 6:30 p.m. Monday through Friday, 2:00 p.m. through 6:30 p.m. Saturdays, and 2:00 p.m. through 5:30 p.m. Sundays.

grams became avaliable to it at prices which would render them feasible for sponsorship by commercial advertisers over free television (J.A. 163-165).

In the Decision, which is the subject of the instant proceeding, the Commission, after holding an evidentiary hearing, concluded that the RKO application met the conditions of the Commission's Third Report, and granted the requested authorization (Decision, 30 F.C.C. 301-32[illegible]. Neither in the Decision, nor in the prior First and Third Reports, did the Commission consider whether it could or should regulate the rates to be charged the public. Its sole expression with respect to rates was to require that charges, terms and conditions of service be applied uniformly. Decision, 30 F.C.C. at 310-311, 322; First Report, 16 Pike and Fischer, R.R. at 1529-30.

The court below held that the Commission (1) possesses the power under the Communications Act to authorize a trial or experimental pay-TV operation, (2) had properly determined to authorize this proposed experiment despite the fact that it had no precise knowledge of the programming which would be presented, and (3) had not erred in concluding that the proposed programming plans would nevertheless serve the public interest. The latter two questions are not put forth as grounds for the granting of certiorari by this Court.

With respect to the question of the Commission's power, the court below held (App. 5a-6a):

> The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations not pertinent here, to issue a broadcasting station license to any

applicant "if public convenience, interest and necessity will be served thereby." 47 U.S.C. Sec. 307(a). Additionally, Congress specifically commanded the Commission by Sec. 303(g) of the Communications Act, to "study *new uses* for radio, *provide for experimental uses of frequencies*, and generally encourage the larger and more effective use of radio in the public interest." (Emphasis added.) The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities. The Supreme Court has said that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." *United States* v. *Missouri Pac. R.R.*, 278 U.S. 269, 278 (1929).

The court below further held that the fact that the authorization was for three years duration, the normal life of a conventional broadcast license, did not alter the essentially experimental nature of the grant. It pointed out that if difficulties were to arise during the trial operation which might result in harm to the public interest, the Commission could terminate the experiment upon notice and hearing and that the Commission could decline to renew the authorization at the expiration of its three-year term (App. 6a-7a).

REASONS FOR GRANTING THE WRIT

1. A system which requires the direct payment of fees by the public, in order to receive programs broadcast on publicly controlled broadcast facilities, represents a major and a drastic change in the nature of American broadcasting. Until now, broadcasting has

been supported solely by commercial advertisers. There was, and is, no direct, financial relationship between a listener and a broadcast licensee. The absence of this relationship is more than just a matter of commercial choice; it represents an important feature distinguishing broadcasting from public utilities and common carriers—a distinction which was explicitly recognized by Congress when it drafted and adopted the Communications Act and its predecessor statutes.[15]

The decision below is, therefore, of far reaching significance, and may result in a basic change in activities which consume a very substantial portion of the time and attention of the people of the United States. The dangers inherent in a pay-TV operation, however, are more serious than the mere establishment of a new system to be operated under a different theory of broadcasting. If allowed to flourish, it raises the spectre of permanent loss of programs and program talent to the free viewing audience and, in addition, may siphon viewers from the programs that remain on free television and thereby threaten the commercial support which free television needs.[16] Moreover, the establishment of a pay-TV system raises the problem of control of broadcast material by the owners of the patents covering that system in much the same way as

[15] See, *e.g.*, the remarks of Senator Broussard who, during the debates on the Radio Act of 1927, stated "radio makes no direct charges whereas the others (telephone and telegraph) are in the business of serving the public for direct pay." 67 Cong. Rec. 12504. See *Pulitzer Publishing Co.* v. *Federal Communications Commission*, 68 U.S. App. D.C. 124, 126, 94 F. 2d 249, 251.

[16] The Commission itself is aware of this possibility. See Decision, 30 F.C.C. 314; First Report, 16 Pike and Fischer, R.R. at 1521.

the owners of original radio broadcast patents threatened to establish absolute control in the early days of radio.[17] The Commission itself is aware of this danger.[18]

The Commission in the First Report[19] concluded that the Communications Act empowered it to authorize pay-TV operations on a permanent basis. Although it admitted that the Act contains no specific or direct delegation of power which authorizes such a drastic change in the concept of American broadcasting, it found the requisite power in the general provisions of the Act, particularly Section 301, 303(b), 303(e), and 303(g). It found further support for its conclusion in the legislative history of the Radio Act of 1927, 37 Stat. 302, *et seq.* It concluded that, "We have stated that in our opinion the Commission has the power to authorize subscription television operations. For the reasons discussed below, we make the further finding that it would be in the public interest to exercise this power to the extent of the action we are taking herein concerning trial operations." See First Report, 16 Pike and Fischer, R.R. at 1520.

The statutory provisions relied upon by the Commission do not support the Commission's interpretation of its power. Section 301 of the Act merely states

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[17] See *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137.

[18] See First Report, 16 Pike and Fischer, R. R. at 1524.

[19] The only determination by the Commission with respect to its basic statutory power concerning pay-TV is contained in the First Report. The Decision which is the subject of the instant proceeding is concerned essentially with whether the RKO application meets the conditions set forth in the Commission's First and Third Reports.

the general purposes which the Act was drafted to effectuate. This broad statement does not grant the Commission any power. It nowhere suggests or even hints that the use of the public channels can be licensed to those who would withhold the benefits of those channels from persons who fail to pay a per program fee.

The general powers of the Commission are stated in Section 303. Thus, Section 303(b) gives the Commission power to prescribe the nature of the service to be rendered by each station. Section 303(c) allows the Commission to assign frequencies to various classes of stations and to designate the power and the time which they may operate. Section 303(d) allows the Commission to determine the location of the different stations. Section 303(e) allows regulation of the apparatus to be used. Section 303(f) grants the Commission power to make such regulations as are necessary to prevent electrical interference between stations and to carry out the provisions of the Act. The balance of Section 303, with the exception of subsection (g), covers miscellaneous rules to insure the proper technical operation of all stations.

The only part of Section 303 which gives any support whatever to the interpretation adopted by the Commission is Section 303(g), which empowers the Commission to study new uses for radio and to provide for experimental uses for frequencies, and generally to encourage the larger and more effective use of radio in the public interest. Unquestionably, this section grants the Commission the power to permit the conduct of technical tests such as those referred to above to determine whether the equipment can perform satisfactorily. Indeed, the Commission has specifically set forth in its Rules provisions for "experi-

mental" television stations, as well as for experimental and developmental radio stations (see 47 CFR 4.101-4.351).[20] However the power to utilize frequencies for technical experiments does not justify the use of a frequency on a trial basis in which the licensee, for a period of 3 years, will attempt to persuade 50,000 home-owners to rent its equipment and pay for its programs at a cost of approximately $15,500,000.[21]

Neither does the legislative history of the Radio Act of 1927 support the Commission's interpretation of its power. If anything, that history establishes that although the notion already existed that radio programs might be presented to the public on the basis of the payment of a direct fee from the public to the broadcaster, advertiser supported broadcasting had become so firmly established that the Congress did not consider subscription broadcasting as a meaningful possibility. See, *e.g.*, 67 Cong. Rec. 12335, 68 Cong. Rec. 2580, 2880-2881, 3033.

In essence, the Commission's position comes down to this: Congress gave its broad powers to regulate communications, specifically instructed it to study new uses for radio, and did not specifically deny it the power to license pay-TV operations. Thus, argues the Commission, it has the power to grant authorizations of a unique and revolutionary character which were never

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[20] The Commission's Rules provide that "experimental" television broadcast stations may not charge, either directly or indirectly for their programs. Identical provisions are found in the case of developmental broadcast stations. (See 47 CFR 4.382.) These Rules prohibit any commercial operation, *i.e.*, they prohibit charges for advertising.

[21] This is RKO's own estimate of its programming and decoder revenue. J. App. 122.

contemplated by the drafters of the Act and which differ from any problems with which it has ever before dealt. It does so despite the fact that the organic act under which it was created sets out no guideposts or standards with which to protect the public.[22]

This Court's mandate in *Interstate Commerce Commission* v. *United States ex rel. Los Angeles,* 280 U.S. 52 seems particularly appropriate in this situation. There, in a situation in which a regulatory agency attempted to infer from the grant of broad, not clearly applicable, powers, the power to order an action which might result in large-scale dislocation to railroad lines throughout the country, which might have an effect on every city in the United States, and require the establishment of new tribunals to apportion various expenditures and costs which would thereby accrue, this Court stated that "* * * a proper statute would seem to require detailed directions and we should expect the intention to be manifested in plain terms and not to be left to be implied from varied regulatory provisions of uncertain scope" (280 U.S. at 69). See also *Blau* v. *Lehman,* 82 S. Ct. 451, 455 (1962); *Border Pipeline Co.* v. *Federal Power Commission,* 84 U.S. App. D.C. 142, 145, 171 F. 2d 149, 152.

The court below never reached the basic question of the Commission's power. It did not address itself to the Commission's determination that it possesses the power to authorize pay-TV on a regular, perma-

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[22] A serious question is raised as to whether the Commission has the statutory power to authorize pay-TV systems, if Congress has deprived it of the concomitant power to regulate the rates which will be charged the public. See discussion *infra,* pp. 23-25.

nent basis.[23] It held, merely, that the Commission's power to provide for experimental uses of frequencies constituted a sufficient basis for the authorization here in issue. Its opinion is explained and justified exclusively by the experimental nature of the authorization.

It is respectfully urged that this opinion is erroneous because, as has been shown, the Communications Act does not provide a basis for this authorization. But more significantly, the court below did not test the validity of the Commission's action on the basis posited by the Commission itself. The issue of the Commission's power to authorize true experiments was not presented in the instant case, because the Commission did not base this action on that power. The Commission's determination to proceed with this "trial" is grounded squarely upon its determination that it possesses the power to authorize pay-TV operations on a permanent basis. If the Commission had concluded that it did not possess the power to authorize permanent pay-TV operations, it is doubtful whether it would have proceeded with this "trial." In such circumstances, if it deemed pay-TV to be in the public interest, it might reasonably have sought from Congress the necessary permanent authorization before proceeding with any "trial" operations.

That fact that this "trial" will have a grave impact on the public cannot be questioned. The pay-TV proponents anticipate that the Hartford public will spend more than $15,000,000 in three years. Moreover, the Commission's First and Third Reports con-

[23] The court below correctly stated Petitioners' contention in this regard, that "* * * the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees from the public * * *." (App. 5a.)

template additional "trials" of other systems, and, in fact, an application has been filed with the Commission seeking authorization for the trial of another system in Denver, Colorado.[24] Under the Third Report there may be as many trials as there are systems, and each would take place in a major community of the United States. The problems raised thereby are of the greatest significance, and the trials themselves may result in a grave impact, both financial and otherwise, on very substantial portions of the public.

The Commission's Decision did not rule on the specific issue of whether the Commission had the power to authorize the instant operation, as an experiment, if it did not have the power to authorize it on a permanent basis. Had the Commission's Decision been grounded on that power, the decision of the court below would have been meaningful, though incorrect. Since the authorization to RKO was based on the asserted power of the Commission to authorize pay-TV on a regular basis, and since the proposed "trial" may itself have the most serious, permanent impact on the public, the decision of the court below failed to decide the issue which was presented, and will, if allowed to stand, permit a far reaching and important change in American broadcasting and the powers of the Commission without any adequate judicial review.

2. The court below also ignored a serious question which flows inevitably from the decision which it reached. Does the Commission have the power to regu-

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[24] Application of Gotham Broadcasting Corporation for authorization to conduct subscription television operations over Station KTVR, Channel 2, Denver, Colorado, listed as accepted for filing by the Commission on May 10, 1962, F.C.C. Report No. 6774, Mimeo. No. 20019.

late the rates which may be charged the public under pay-TV operations, and, if such power does exist, should it be exercised by the Commission either with respect to the trial operation here authorized or with respect to any permanent pay-TV operation? Of course, if it were determined that the Commission lacks the statutory authority to permit pay-TV operations, this question would not arise. On the other hand, if the court below was correct, the question of the Commission's regulatory responsibilities in this area is one of grave significance both to the affected public and to the future exercise of regulatory responsibilities by this Commission and by other Federal regulatory agencies.

In neither the First or Third Reports or the Decision here under review did the Commission discuss whether it has been empowered to regulate the rates which may be charged the public, or whether, if it possesses such power, it must or should be exercised with respect to pay-TV. In the First Report, the Commission did expressly consider whether pay-TV is "broadcasting" or "common carriage", as defined in Sections 3(o) and 3(h) of the Communications Act. It concluded that it was both unnecessary and undesirable to determine at this stage the proper classification of pay-TV under the Communications Act. 16 Pike and Fischer, R.R. at 1519-1520. Had the Commission determined that pay-TV is "broadcasting" it might have been contended that the Commission is without power to regulate the rates which might be charged the public. *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U.S. 470. By failing so to classify pay-TV, the Commission in effect left open the question of its existing power to

regulate rates. Indeed, the Government expressly urged in the court below that one of the remaining problems which the Commission would have to decide is whether it should regulate rates, and, if so, in what manner. The Government also stated that if it were determined that rates should be regulated, the type and degree of regulation might or might not require additional legislation.[25]

In the hearing conducted on the RKO application the Commission did not elicit any of the information which normally would be required to determine the reasonableness of rates to be charged. The record before the Commission does not contain any cost breakdown of RKO's estimates of cost, no analysis of RKO's estimated revenues, and the decision contains no discussion of what a "reasonable" rate might be or the traditional methods by which the reasonableness of charges in other fields are determined. In fact, the Commission stated that "* * * the question of reasonableness is not within the issues as framed."[26] Decision, 30 F.C.C. at 311.

Petitioners respectfully urge that no valid authorization for pay-TV operations could be made absent a determination by the Commission whether it can or should regulate the rates to be charged. The principal purpose of the trial operation is to determine the eco-

[25] See brief of Appellee-Respondent below, p. 23.

[26] The authorization granted to RKO is conditioned upon the applicant's maintaining a complete record of all aspects of the trial operation, including, presumably, those materials which might conceivably serve as the basis for rate regulation at some future time. However, in light of the Commission's express statement that the issues do not concern the question of rate regulation, it is apparent that the Commission has not considered either whether it has the power to regulate rates or should exercise that power.

nomic feasibility of pay-TV, since its technical feasibility has already been established. It is the essence of arbitrary Commission action to authorize a radical departure from the established system without even giving thought to the question whether the Commission has or should exercise regulatory power over the single aspect of the new system which serves to differentiate it in such a marked way from the system which has been in effect for almost 40 years.

Nowhere in the instant decision, or in the prior First and Third Reports, did the Commission suggest that one of the purposes of the "trial" operation is to determine whether rates should be regulated. The First and Third Reports and the instant decision are devoid of any indication that the Commission gave any thought whatsoever to this question. Neither did the court below consider this aspect of the implications of its basic determination which affirmed the Commission's power to authorize pay-TV operations on a trial basis.[27]

All of the questions of the Commission's basic power to authorize pay-TV operations and the propriety of its exercise are intimately connected with the questions of the Commission's power of rate regulation and the propriety of the exercise of that power. It is respectfully submitted that to allow the institution of this radical new service without any determination either by the licensing authority or a reviewing court of the essential question of rate regulation is clearly erroneous.

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[27] The entire matter of the Commission's regulatory power over rates was presented to the court below in the Briefs of Petitioners and the Government. See Petitioners Brief, pp. 20-21, 22-23, Government's Brief, p. 23, Petitioners Reply Brief, pp. 4-6.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARCUS COHN
Counsel for Connecticut Committee Against Pay TV, Stanley Warner Management Company, Loew's, Inc., Connecticut Theatres, Manchester Drive-In Theatre Corporation, Outdoor Theatres Corporation

June 6, 1962

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16278

CONNECTICUT COMMITTEE AGAINST PAY TV,
STANLEY WARNER MANAGEMENT COMPANY, LOEW'S, INC.,
CONNECTICUT THEATRES,
MANCHESTER DRIVE-IN THEATRE CORPORATION,
OUTDOOR THEATRES CORPORATION, APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION, APPELLEE
RKO PHONEVISION COMPANY, INTERVENOR

On Appeal from the Federal Communications Commission

No. 16315

CONNECTICUT COMMITTEE AGAINST PAY TV, *et al.*,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION,
UNITED STATES OF AMERICA, RESPONDENTS
RKO PHONEVISION COMPANY, INTERVENOR

On Petition for Review of a Decision of the Federal Communications Commission

Decided March 8, 1962

Mr. Marcus Cohn for appellants in No. 16278 and petitioners in No. 16315. *Mr. Martin Jay Gaynes* entered an appearance for appellants in No. 16278 and petitioners in No. 16315. *Mr. Paul Dobin* also entered an appearance for petitioners in No. 16315.

Mr. Max D. Paglin, General Counsel, Federal Communications Commission, with whom *Mr. Daniel R. Ohlbaum*,

Assistant General Counsel, Federal Communications Commission, was on the brief, for appellee in No. 16278 and respondent in No. 16315. *Mrs. Ruth V. Reel*, Counsel, Federal Communications Commission, also entered an appearance for appellee in No. 16278. *Mr. Richard A. Solomon*, Attorney, Department of Justice, entered an appearance for respondent United States of America in No. 16315.

Mr. Harold David Cohen, with whom *Mr. W. Theodore Pierson* was on the brief, for intervenor. *Mr. Vernon D. Kohlhaas* also entered an appearance for intervenor in No. 16278.

Before EDGERTON, BASTIAN and BURGER, *Circuit Judges*.

BURGER, *Circuit Judge:* This matter comes to us on a consolidated proceeding arising out of an appeal under Sec. 402(b) of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. § 151 (1958), and on a petition for review under Sec. 402(d) of the Act. Both the appeal and the petition seek review of a Report, Decision and Order of the Federal Communications Commission granting RKO Phonevision Company, the Intervenor authority to conduct a three year trial operation of "pay" or subscription television in Hartford, Connecticut, to be operated by Zenith Radio Corporation Phonevision system.

In 1955 the Commission issued a Notice of Proposed Rule Making in which it sought an expression of views from interested parties on the question whether the Commission had the power to authorize pay-television operations and, if it had such power, whether such operations would be in the public interest. Subsequently the Commission issued a series of reports which in essential part concluded that the Commission had statutory power to authorize some form of direct payment or subscription television system. The several reports set forth the following among the conditions under which such a system

would have to operate initially: (1) trial authorization would be limited to a three year period; (2) the public could not be forced to purchase any special receiving equipment; (3) the licensee would be required to retain full freedom of program choice and subscription rates to be charged; (4) the trial of any one system would be limited to any one of the twenty major markets which have four television stations. Hartford is one of those areas.

In June, 1960, the RKO Phonevision Company, purchaser of the assets of television station WHCT in Hartford, applied for authority to utilize that station for a pay-television trial under the terms established by the Commission. The RKO Phonevision Company is a wholly owned subsidiary of RKO General, Inc., and will hereafter be referred to as RKO. Hearings on the application were held before the Commission in October, 1960 and in February, 1961 the application was granted.

In essence RKO proposes to provide subscription television programs over WHCT approximately 40 hours a week, of a total 70 hour broadcasting schedule, using a "Phonevision" system which is supported by direct payment of charges by subscribers.[1] During these forty hours the signal beamed from WHCT will be garbled or "scrambled" by an encoding device, thus preventing general reception. Those who wish to subscribe will rent a decoding mechanism provided by the Phonevision System which when attached to their conventional television receivers will decipher the garbled signal and convert it into a normal image on the television screen. Installation of the decoder in the subscriber's set will cost an estimated $7.50 to $10 and rental charges on the decoder thereafter may not exceed $.75 weekly. Subscribers will be free to terminate

[1] We note that the remaining 30 hours given to "free" television broadcasting meets the FCC requirement of a minimum 28 hour broadcasting week. 4 C.F.R. § 3.651(2).

subscriptions at the end of any month. The Intervenor contemplates a maximum of 40,000 subscribers.

Individual program cost will vary from $.25 to $3.50, with the majority of offerings predicted to fall within the $.75 to $1.50 range. Subscribers will be billed on the basis of a record of usage kept by a paper billing tape installed inside the decoder which will perform the function of a meter. Since the entire operation is to be financed by this direct payment arrangement, no commercial messages will be broadcast during the 40 hours this system is operative.

At the time of the Commission's decision, RKO had done no more than discuss and explore probable programming with prospective suppliers of contemplated program material, and had neither made nor received any firm commitments as to precisely what would be televised once the subscription broadcasting operation commenced. Plans called for a major portion of the forty hours of subscription time to be devoted to first run motion picture films, with the residue of time given to legitimate theatre, opera, ballet, concerts, educational features, art and children's films, and sports features as they occur and are available. The Commission predicted that programming along these lines should not entail substantial limitation on the types of programs the Hartford public would see generally, since with only insignificant exceptions the same or similar programs which the subscription system would displace in the WHCT broadcasting schedule would be offered by other stations in the Hartford area.

The Commission necessarily could not predict what if any adverse economic impact a subscription system would have upon the balance of the Hartford area television industry, but reasoned that the public need and utility of experimenting with such a system justified whatever unknown economic risks might be incurred during a trial period. Similarly the extent of harmful diversion of exist-

ing "free" television programs away from local stations to the subscription outlet could not be demonstrated, and the Commission concluded that any final appraisal of this potential problem could not reasonably be resolved prior to the outcome of the trial operation itself. In short the very purpose of the projected experiment is to explore these unknown and unpredictable factors.

The appellant Connecticut Committee Against Pay TV is an organization representing Hartford theatre owners and other interested local groups. It argues on this appeal, *inter alia*, that (1) the Commission lacks statutory power to authorize a television broadcast system which requires the direct payment of fees from the public; (2) the Commission erred in granting the temporary license to RKO without knowing what programs WHCT would in fact telecast and (3) that the Commission erred in concluding that RKO's proposed programming plans would serve the public interest. We have examined these contentions carefully in view of the importance of the questions to the public and to the industry; in its precise form the chief question presented is one of first impression.[2]

The Federal Communications Commission was established in 1934 under a typically broad grant of power by which the Commission was authorized by Congress, subject to limitations not pertinent here, to issue a broadcasting station license to any applicant "if public convenience, interest and necessity will be served thereby." 47 U.S.C. § 307(a). Additionally, Congress specifically commanded the Commission by Sec. 303(g) of the Communications Act, to "study *new uses* for radio, *provide for experimental*

[2] Other subscription services, specifically the *Muzak* enterprise and FM radio's Functional Music projects, have been found perfectly acceptable by both Commission and the courts. See Functional Music, Inc. v. F.C.C., 107 U.S. App. D.C. 34, 274 F. 2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959); Muzak Corporation, 8 F.C.C. 581 (1941).

uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest." (Emphasis added.) The plain language of the statute thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities. The Supreme Court has said that "where the language of an enactment is clear and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the meaning intended." *United States* v. *Missouri Pac. R.R.,* 278 U.S. 269, 278 (1929).

The distinguishing characteristic of the Federal Communication Commission's authorization of subscription television in this case is the experimental or trial basis upon which the system is to operate for the duration of its three years authority. That three years is the normal life of a conventional license does not alter the essentially experimental nature of the grant. We think it not reasonable to assume that the worst will happen and that the public convenience, interest or necessity will be so undermined by such a trial as to require us now, at this stage, to invalidate the WHCT license. By their very nature the grants of operating authority for which regulatory agencies issue certificates relate to the public convenience and necessity *of the future* and much about the future is unpredictable. See *American Airlines* v. *C.A.B.,* 89 U.S. App.D.C. 365, 192 F.2d 417 (1951). It seems to us that unless the future of television is to be confined to its present state the Commission must be reasonably allowed opportunity to experiment. Difficulties are foreseeable, as both RKO and the Commission readily acknowledge, but if the difficulties are overcome the public benefits anticipated by the Commission warrant the risks of the experiment. Should the problems and difficulties exposed by the

experiment fulfill appellant's prediction of harm to the public interest, then the FCC has retained power to terminate the experiment upon notice and hearing at any time prior to the expiration of the license at the end of the three year period. And of course the Commission has the power to decline to renew the license once three years have expired. We cannot assume the Commission will abdicate its powers or fail to keep this important experiment under close and constant scrutiny.

The Commission has declared its determination to oversee carefully the form which programming takes under the subscription system. Surely its power to see that this area of the public domain is used in the public interest is not less for "paid" television than for the existing system of so-called "free" television. While it is reasonable not to require the licensee to commit itself now to definite named programs until the wishes of the subscribers have been more completely sounded, and the potential sources of program material more fully explored, nevertheless it seems to us imperative that the licensee be held to adhere faithfully to the high standard of programming which it has promised. To say the Commission cannot exercise supervision to that end would denude the experiment of its creative potentialities and dilute the Commission's power to make a final appraisal when the experiment is completed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,278

No. 16,315

On Appeal (No. 16,278) from Decision and Order of the Federal Communications Commission, and

On Petition to Review (No. 16,315) Decision and Order of the Federal Communications Commission.

Before: EDGERTON, BASTIAN and BURGER, *Circuit Judges.*

Judgment

These cases come on to be heard on the record from the Federal Communications Commission, and were argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this court that the order and decision of the Federal Communications Commission in these cases is affirmed.

Per Circuit Judge Burger.

Dated: March 8, 1962.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	14

CITATIONS

Cases:

Functional Music, Inc. v. Federal Communications Commission, 274 F. 2d 543, *certiorari denied*, 361 U.S. 813 — 11

Interstate Commerce Commission v. *United States ex rel. Los Angeles*, 280 U.S. 52 — 11

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United States v. *Storer Broadcasting Co.*, 351 U.S. 192 — 11

Administrative Decisions:

First Report on Subscription Television, 23 F.C.C. 531 — 3, 5, 7, 9, 13

Muzak Corp., 8 F.C.C. 581 — 10

Second Report on Subscription Television, 16 Pike & Fischer, Radio Regulation 1539 — 3, 4

Third Report on Subscription Television, 26 F.C.C. 265 — 4, 5, 7

646460—62

Statutes:

Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 et seq.: Page

Section 303(a) 10

Section 303(b) 10

Section 303(g) 8, 10, 11

Section 307(a) 8, 10

Miscellaneous:

105 Cong. Rec. 5362–5363 5

Notice of Proposed Rule Making in Docket No. 11279, 20 F.R. 988 ..... 2, 3

Notice of Further Proceedings in Docket No. 11279, 22 F.R. 3758 3

H.R. 586, 85th Cong., 1st Sess 4

H.R. 9629, 85th Cong., 2d Sess 4

S. 2934, 85th Cong., 2d Sess 4

S. 3201, 85th Cong., 2d Sess 4

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 161

CONNECTICUT COMMITTEE AGAINST PAY TV, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–7) is reported at 301 F. 2d 835. The First and Third Reports on Subscription Television of the Federal Communications Commission, prescribing the conditions under which the Commission would authorize a trial of subscription television operations, are reported at 23 F.C.C. 521 and 26 F.C.C. 265. The Commission's Second Report on Subscription Television has not been officially reported, but is reported unofficially at 16 Pike & Fischer, Radio Regu-

lation 1539. The Commission's Report and Decision granting the application of Hartford Phonevision Co. (now RKO General Phonevision Co.) for authority to conduct a trial subscription television operation is reported at 30 F.C.C. 301.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 8, 1962 (Pet. App. 8). The petition for a writ of certiorari was filed on June 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission is empowered to license on a trial basis a subscription television service which requires the payment of a fee by the public to receive programs.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at pages 2–6 of the petition.

STATEMENT

In 1955 the Commission instituted a rule making proceeding to determine whether television broadcast stations should be authorized to transmit programs whose reception by the public in intelligible form would require the payment of a charge (Notice of Proposed Rule Making in Docket No. 11279, 20 F.R. 988). In the Notice of Rule Making the Commission requested comments on the questions whether it had

statutory power to authorize subscription television operations and, if so, whether such operations would be in the public interest (20 F.R. at 989). By a Notice of Further Proceedings of May 23, 1957, the Commission requested further comments on the conditions under which it might be desirable to authorize subscription television on a trial basis (22 F.R. 3758).

Thereafter, in its First Report on Subscription Television (23 F.C.C. 531), issued October 17, 1957, the Commission determined, after a review of the pertinent statutory provisions and their legislative history, that it had statutory authority to authorize subscription television (*id.* at 535–540). It stated, however, that in the absence of a demonstration of the service in operation, it could not determine whether authorization of a subscription system on a permanent basis would be in the public interest (*id.* at 542–543). It concluded that a trial of subscription television under conditions established in advance by the Commission would serve the public interest by enabling the public to register its judgment and by providing operational data on competitive impact, technical standards and the possible need for new legislation to support additional administrative supervision (*id.* at 555–556). The Commission then prescribed the conditions under which applications for trial subscription television operations would be considered (*id.* at 546–555).

On February 26, 1958, the Commission issued a Second Report on Subscription Television, 16 Pike & Fischer, Radio Regulation 1539, announcing that it would not process applications for trial authoriza-

tion until 30 days after the adjournment of the 85th Congress. This Report followed the introduction in Congress of a number of bills which would have either prohibited subscription television or restricted the Commission's authority to authorize it,[1] as well as adoption of resolutions by the House and Senate Interstate Commerce Committees proposing that the Commission withhold action until specifically authorized by Congress (*id.* at 1539–1540).

When none of these pending bills were acted upon by Congress, the Commission on March 23, 1959, adopted a Third Report in Docket No. 11279, 26 F.C.C. 265, in which it decided to process applications filed in conformity with revised requirements set forth therein. These requirements provided, *inter alia,* that trials would be authorized only in cities with four or more commercial television services; that trial authorizations would be limited to a three-year period, not renewable as of right; and that the licensee would be required to retain control of programs and subscription rates and to furnish periodic and other special reports to the Commission concerning all aspects of the subscription television operation, including the fixing and collection of fees (26 F.C.C. 267–272). In order to insure against a premature establishment of subscription service, the Commission added further requirements (1) limiting the trial of any one system to one city and permitting only one trial operation in any particular community, and (2)

[1] See, *e.g.*, H.R. 586, 85th Cong., 1st Sess.; S. 3201, 85th Cong., 2d Sess.; H.R. 9629, 85th Cong., 2d Sess.; S. 2934, 85th Cong., 2d Sess.

prohibiting the sale to the public of the special receiving devices required for subscription television (*id.* at 266).

At the same time the Commission reaffirmed (26 F.C.C. 266) its intention, announced in the First Report, to hold full public hearings before reaching a decision on the permanent authorization of subscription television (23 F.C.C. 556):

> The Commission will, when it finds that sufficient, meaningful data are available from trial subscription television operations, conduct a public hearing at which all interested parties will have full opportunity to submit information, data and views concerning the foregoing [specified public interest questions] and any other questions which remain to be answered in reaching a decision as to whether the authorization of a subscription television service on some extended or continuing basis would serve the public interest.

On March 26, 1959, the House Interstate Commerce Committee adopted a resolution stating that it had no objection to the authorization of trial subscription television operations as contemplated in the Third Report (105 Cong. Rec. 5362–5363).

On June 22, 1960, Hartford Phonevision Company (RKO) [2] filed an application for authority to conduct trial subscription television operation over its television station WHCT in Hartford, Connecticut, dur-

[2] The name of the applicant was subsequently changed to RKO Phonevision Company, and is now RKO General Phonevision Company. See motion of RKO General Phonevision Company for leave to be named a party-respondent in this Court.

ing 40 hours of the station's 70-hour broadcast week (J.A. 5).[3] The so-called "Phonevision" system proposed by RKO involves the use of an encoder which "scrambles" (renders unintelligible) the video and audio signals of a standard television transmitter and a decoder, placed on the receiver of a subscriber, which restores intelligibility (30 F.C.C. 302–303). The subscriber will be required to pay an installation charge estimated at between $7.50 and $10; a rental charge, not to exceed 75 cents a week, to cover repairs and maintenance service; and a per program charge of from 25 cents to $3.50, with most programs expected to fall within the price range of 75 cents to $1.50 (*id.* at 304). The operation is to be financed solely by these charges; there is to be no commercial advertising (*id.* at 308). RKO's programming plans consist mainly of "box-office attractions" (i.e., programming for which the public would ordinarily pay an admission charge), including first-run motion pictures, legitimate theatre, opera, ballet, concerts, educational features, art and children's films and sports features (*id.* at 307–308).

Following a public hearing before the Commission *en banc*, in which petitioners participated as parties in interest, the Commission, in a Report and Decision issued February 23, 1961, found that a grant of the RKO application for a trial subscription television operation would be in the public interest (*id.* at 301, 321). The Commission concluded that the proposed

[3] The citation is to the joint appendix filed by the parties in the court of appeals which is presently on file with the Clerk of this Court.

trial would fulfill the objectives of the First and Third Reports on Subscription Television and provide useful information which would assist the Commission in its ultimate determination whether some form of subscription television service on a permanent basis would be in the public interest (*id.* at 310, 321).

In reaching this conclusion, the Commission determined that the arrangements proposed by RKO adequately protected subscribers against the purchase of equipment which might later become worthless (*id.* at 311);[4] that the station licensee would retain adequate control over programs and maximum charges (*id.* at 312–313); that, while some conventional programming in Hartford would be displaced and some program sources diverted to subscription television, the effects would not be substantial, and could, in any event, only be determined by the trial itself (*id.* at 313–315); and that severe adverse effects on the other television stations in the Hartford area could not be expected (*id.* at 315–316). The Commission granted the requested authorization for a period of three years, subject to the conditions of the Third Report and to the further express conditions that the authorization was not renewable as of right and could be revoked

[4] The Commission rejected a contention that installation and rental charges on the decoders should not be permitted, stating (30 F.C.C. 311): "it would appear that such proscription could rob the trial of at least some of its value, for if the decoders were literally given away, we would receive no indication of the public's true capacity and desire to pay some amount toward amortization or depreciation of decoders." The Commission also rejected, as without record support, a claim that the proposed charges were unreasonable (30 F.C.C. 311, fn. 6).

or modified at any time upon notice and hearing (*id.* at 321–322).

The court of appeals affirmed the Commission's decision on March 8, 1962 (Pet. App. 1–7). It did not accept the contention of petitioners that the Commission lacks statutory power to authorize a system which requires the direct payment of fees from the public. The court found that the Commission was given a "broad grant of power" by Congress, subject to limitations not pertinent here, to issue a license to any applicant if the public interest would be served (47 U.S.C. 307(a)), and that Congress had specifically commanded the Commission in Section 303(g) of the Communications Act to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" (Pet. App. 5–6). The court held that the plain language of the statute "thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities" (Pet. App. 6).

Finding that the distinguishing characteristic of the authorization in this case was its trial nature, the court of appeals also rejected the contention that the predicted dangers of a trial of subscription television rendered such a trial contrary to the public interest (Pet. App. 6–7). It noted that every license for future operation necessarily involves some predictions as to an uncertain future, and found reasonable the Commission's determination that "the public benefits anticipated by the Commission warrant the risks of

the experiment" (Pet. App. 6). The court also pointed out, in this connection, the power retained by the Commission to terminate the trial upon notice and hearing at any time prior to the expiration of the 3-year period, and the Commission's expressed determination to oversee carefully the conduct of the trial.

ARGUMENT

1. The only issue properly before the Court is whether the Federal Communications Commission is empowered to authorize on a trial basis a subscription television system which requires the payment of direct fees by the public.[5] The decision below, upholding this power, was correct and no further review by this Court is warranted.

Petitioners contend (Pet. 17–20) that, because of the novel nature of subscription television, the Commission is without power to license it, in the absence of a specific affirmative grant of such power in the Communications Act. This contention rests on a misreading of the Act which, as found by the court

[5] "The dangers inherent in a pay-TV operation" set forth at pages 15–17 of the petition represent petitioners' predictions of the effects of permanent authorization of subscription television and do not provide a reason for the grant of certiorari in this case. It is for the precise purpose of providing operational data which will enable the Commission to evaluate the impact and benefits of subscription television before deciding whether to authorize it on an extended basis, that this trial was authorized. A determination of the public interest objections to permanent operation asserted here by petitioners will be made at a further hearing to be held by the Commission at the conclusion of the trial operation (23 F.C.C. 556).

of appeals, confers a "broad grant of power" upon the Commission (Pet. App. 5). Thus, Section 307(a) authorizes the Commission, subject to limitations not pertinent here, to grant a station license to any applicant "if public convenience, interest, or necessity will be served" (47 U.S.C. 307(a); Pet. 6). Sections 303(a) and (b), 47 U.S.C. 303 (a), (b) (Pet. 4), empower the Commission to classify stations and to prescribe the nature of the service rendered by each class of station and each station within any class. Congress, in Section 303(g), also directed the Commission, "Except as otherwise provided in this Act," to "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g); Pet. 5). Since there is no provision in the Communications Act either prohibiting a service requiring the direct payment of a fee by the public or limiting the use of radio frequencies to those services which were common when the law was enacted, these provisions, without more, afford ample basis for the Commission's action and a full answer to petitioner's attack upon it.

The Communications Act does not itemize the types of radio service which the Commission is authorized to license and neither the statute nor the cases interpreting it provide a ground for petitioners' assertion that such specific authorization should be required in the case of subscription television.[6] For,

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[6] The authorization of a subscription service is not without precedent. See *In the Matter of Muzak Corporation*, 8 F.C.C.

as this Court has declared, "Congress was acting in a field of regulation which was both new and dynamic." Its "dominant characteristic . . . was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." Instead, it defined broad areas for regulation under governing standards (*id.* at 219–220) and, recognizing that the Commission's "authority covers new and rapidly developing fields" (*United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203), affirmatively directed the Commission to encourage new uses for radio (47 U.S.C. 303(g)),[7] and clothed it with wide discretion in choosing among the competing demands for frequencies.

As the court of appeals held upon a careful examination of petitioners' contention, the plain language of the statute places upon the Commission "an af-

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581; *Functional Music, Inc.* v. *Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813.

[7] Petitioners' reliance (Pet. 20) upon *Interstate Commerce Comission* v. *United States ex rel. Los Angeles*, 280 U.S. 52, is misplaced. In that case, the statute authorized the Interstate Commerce Commission to require a carrier to permit another carrier to use its terminal facilities. This Court refused to extend that power to permit the Commission to compel carriers "to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles" (280 U.S. at 68).

firmative duty . . . to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities" (Pet. App. 6). The license challenged here, falls squarely within the scope of that duty.[8]

2. Petitioners' contention (Pet. 22–25) that the Commission erred in authorizing a trial subscription television operation without first determining whether it can or should regulate rates, is raised for the first time in the petition and is therefore not properly before the Court. This allegation of error was not included in the notice of appeal or in the stipulated issues filed with the court of appeals (J.A. 1–4). Contrary to petitioners' present contention (Pet. 25, fn. 27), it was not presented to the court of appeals in the briefs below.[9]

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[8] Petitioners also urge (Pet. 20–21, 22) that, while the Commission found it had statutory power to authorize subscription television on a regular, permanent basis, the court of appeals did not reach this question and found such authority only to authorize a trial test. We do not believe this to be a correct evaluation of the opinion below, so far as the issue of basic authority raised by petitioners is concerned. Statutory support for the Commission's jurisdiction to authorize a system requiring the payment of fees by the public is equally necessary whether that authorization be for a trial or a permanent operation. Neither the Commission nor the court below (nor, indeed, petitioners) made the alleged distinction. As petitioners recognize (Pet. 21, fn. 23), the court below correctly stated petitioners' contention as a broad attack on the Commission's statutory power to authorize any system requiring the direct payment of fees from the public.

[9] In their briefs before the court of appeals (copies of which are being lodged with this Court), petitioners assumed that the Commission had no power to regulate rates in arguing that it had no power to authorize subscription operations, but did not

In any event, the contention is without merit. This is a trial authorization. The information obtained will assist the Commission in determining whether rates should be regulated, and, if so, what kind of regulation would be required and whether additional legislation might be desirable (see First Report, 23 F.C.C. 531, 533). Petitioners' assertion, made for the first time here, that the Commission was required to answer these questions in advance of the trial authorization would put the cart before the horse. Moreover, the absence of such a determination in no way threatens the public interest. Should the rates charged for the trial service prove objectionable at any time, the Commission, which has required the licensee to retain control over maximum charges (30 F.C.C. 311–312) and has itself retained the power to revoke or modify the authorization upon notice and hearing (*id.* at 321–322), is amply prepared to act.

The short answer to petitioners' contention that the Commission erred in failing to determine its power to regulate the rates charged when and if permanent operations are authorized, is that the trial authorization being contested in this case nowhere presents that question. It will be time enough to consider this issue when the information to be obtained by the trial operation is available and when the question whether to authorize a permanent operation is before the Commission.

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urge that the Commission had erred by failing to consider whether it could or should regulate rates (Brief for Appellants, pp. 20–21, 22–23; Reply Brief for Appellants, pp. 2–6).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

CONNECTICUT COMMITTEE AGAINST PAY TV, ET AL.,
Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION and RKO GENERAL PHONEVISION COMPANY, *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM FOR RKO GENERAL PHONEVISION COMPANY IN OPPOSITION

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MEMORANDUM FOR RESPONDENT RKO GENERAL PHONEVISION COMPANY IN OPPOSITION

RKO General Phonevision Company, which was named a party-respondent by order of the Court on June 25, 1962, hereby concurs and joins in the brief

in opposition which was filed by the Solicitor General on behalf of the Federal Communications Commission.

For the reasons stated in the Government's brief, the petition for certiorari should be denied.

Respectfully submitted.

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July 1962